No. 8428

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

Fidelity and Deposit Company of Maryland, a corporation,

Appellant,

vs.

The State of Montana and The Department of Agriculture, Labor and Industry thereof, for use and benefit of the holders of defaulted warehouse receipts for beans stored in the public warehouse of Chatterton & Son, a corporation, at Billings,

Appellees.

BRIEF OF APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

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Filed ....., 1937.

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STATEMENT OF THE CASE

The following facts are stated only in amplification of the Statement appearing in appellant's brief and as they may controvert the facts stated in appellant's brief.

At the time of and immediately before the matters here in controversy, Chatterton & Son operated warehouses in Michigan, Ohio, Missoura and at Billings, Montana. The principal business was the bean business, buying, selling and storage (Tr. 188). Seventy-five per cent of their business was beans and the grain business was only a small portion thereof. They were referred to as the largest bean jobbers in the United States (Tr. 198). They would handle fifteen car loads of beans to one car

of grain (Tr. 199). They did not deal in grain except in the State of Michigan (Tr. 203). All of their western business consisted exclusively of beans (Tr. 190). The warehouse at Billings was engaged *exclusively* in the bean business (Tr. 190), and as well for the Kansas City terminal warehouse (Tr. 189 and 128).

The agent for the Fidelity and Deposit Co. who wrote the bond in question was an intimate friend of all the chief officers of Chatterson & Son, having close social and business contacts with them (Tr. 190-191). *He knew that the western business of Chatterton & Son, including Billings, was exclusively the bean business* (Tr. 192).

The bond in question was not given to qualify Chatterton & Son under the laws of the State of Montana to do business as a licensed public warehouseman, as stated in appellant's Statement of Case. It was obtained by Mr. Healow, the manager of the Billings warehouse, "for the protection of the growers" (Tr. 131, 157). When the bond was procured, and as well when the renewal certificate was issued, Mr. Healow did not know that it was necessary to have a license from the State, but figured that they should be bonded as a protection to the growers (Tr. 144). In his prvious eight years experience as manager of another bean warehouse (Tr. 128), he had operated under a bond (Tr. 131, 141).

It is not strictly correct to say that the original bond covered the period from January 1, 1930 to July 1, 1930, as stated in appellant's Statement of Case. The only reference to that period of time appearing in the bond (Tr. 13-14) is in the "whereas" clause, wherein it is recited that Chatterton & Son had applied

to the Department of Agriculture for a license to carry on the business of a public warehouseman for that stated period.

In any event, it is likewise not a correct statement to say that the bond was not delivered to the Department of Agriculture until after its term had expired, as appears in appellant's Statement of Case, if it may be considered that the renewal certificate continued the life of the bond. By that renewal certificate the bond was coninued in effect until the 1st day of July, 1931 (Tr. 16), while the bond was transmitted to the Commissioner of Agriculture on May 12, 1931, by Mr. Healow.

The judgment was not for $13,100.00, with interest from July 15, 1931, as stated in the appellant's Statement of Case, but was in said sum "with interest upon said sum from the date hereof" (September 19, 1936). A reference to the judgment (Tr. 125-126) will show that appellant has misconstrued the language thereof, it appearing therein that said stated sum is "the amount of said bond with interest thereon at the rate of six per cent per annum from July 15, 1931,". In other words $10,000.00 with interest from July 15, 1931 to date of judgment. The judgment then carries six per cent interest as provided by Montana statute, from its date.

With respect to delivery of the bond, the agent for the appellant mailed it out of his office on January 15, 1930, to Mr. Healow at Billings. The continuation certificate was forwarded by the agent to the Secretary of Agriculture at Helena, so he says, apparently about July 1, 1930 (Tr. 167). It appears that Mr. Healow received the bond but did not notice that it covered "grain" and not "beans" (Tr. 135). Apparently Mr. Healow

kept the bond, thinking that it had been filed, and transmitted it on to the Commissioner of Agriculture when he discovered it (Tr. 136). The continuation certificate apparently was forwarded by the agent for the bonding company to "Secretary of Agriculture at Billings" (Tr. 164) and received instead by Mr. Healow, but apparently forgotten by him and afterwards found in his files (Tr. 136). It appears that in May, 1931, for the first time, the Commissioner of Agriculture raised the question as to whether a bean warehouse should not file a bond with him and this brought about the inquiry by Chatterton & Son as to where the bond had been mislaid, resulting eventually in its discovery (See history of transaction as disclosed by correspondence appearing in Plaintiff's Exhibits 6 to 17 incl. Tr. 151-177).

In one of these letters the agent for the bonding company acknowledges that the bond had been in force since January 7, 1930 (Tr. 165). In a letter written in May 1931, he transmits a copy of the renewal certificate, in lieu of the original which at that time had not yet been found, and in said letter acknowledges again that bond was in force by renewal (Tr. 171). On December 6, 1930, over the corporate seal of the bonding company and the signature of its attorney in fact the company acknowledges that it is surety upon the bond in dispute, and confirms the bond as effective (Plaintiff's Exhibit 1, Tr. 179).

Mr. Healow, as the manager of the warehouse, from the beginning of storage, offered the bond as an inducement to growers to store their beans in the warehouse. He represented to persons offering beans for storage and always maintained that the warehouse was bonded. He communicated it generally to the growers in the territory (Tr. 134, 155, 183, 184, 185, 186). Such rep-

resentations induced growers to put their beans in the warehouse (Tr. 183, 184, 185, 186).

During the fall and winter of 1930 and continuing through the winter into 1931, 39,897 sacks of beans of 100 pounds each were stored, in the aggregate, by about 130 individual bean growers, and a warehouse receipt issued to each grower by Chatterton & Son (Tr. 137, 226 and Ex. 18 at Tr. 19). The form of warehouse receipt issued was for a lot of beans specifically described and called for return to the holder in accordance with the laws of the State (Ex. 4, Tr. 129). That law will be discussed in the brief. It is the common practice in all bean warehouses and generally understood in the trade that beans taken for storage shall be kept segregated and their identity preserved (Tr. 129-130).

That in this instance, the identity of the beans in this warehouse was not preserved and they were commingled and, from the beginning, the beans were treated by Chatterton & Son as their own, were from time to time shipped from the warehouse and out of the State, and sold and disposed of. The conduct of said Chatterton & Son in handling said beans indicates that they were all converted to the use of Chatterton & Son during the term of the bond. Prior to July 1, 1931, all but 12,000 sacks of the beans had been shipped out of the State by Chatterton & Son to their Kansas City warehouse and there sold and disposed of. The remaining 12,000 sacks were shipped by Chatterton & Son between July 1st and July 13, 1931, to their Kansas City warehouse, and there not only commingled and their identity lost with respect to individual ownership, but they were likewise hypothecated for a loan and converted. The conduct of Chatter-

ton & Son throughout indicates clearly that from the beginning they breached their obligation as a bailee and warehouseman and treated the beans, and all of them, as their own, and ignored the rights of the owners respectively (See generally the testimony of Healow, Tr. 127-147, Harris Tr. 216-225 and Lindsay, Tr. 226-237).

Treating the beans as converted respectively on the dates of shipment out of the State, and considering the value as of the dates of conversion respectively, the aggregate value of all of said beans so converted was the sum of $65,843.57, after crediting all advances made against the same by Chatterton & Son (Tr. 229 and Plf. Ex. 18 at Tr. 19). Treating the conversion as having taken place at the time the warehouse was closed in July 1931, the value of the beans at that time, after crediting all advances, was $37,260.76 (Tr. 233-235).

The agent for the bonding company admitted that when the bond was written he understood that various commodities were to be stored therein, and that, in writing the bond, it was of no interest to him whether beans or grain were to be stored in the warehouse and it would make no difference to him (Tr. 249).

ARGUMENT
(Summary of Argument)

A. The Court Did Not Err In Permitting Complaint To Be Amended.

1. *Amendments Constitute No Material Departure.*
2. *Generally Amendments Are Favored and Should Be Liberally Allowed.*
3. *Action Not Barred By Any Statute of Limitations.*

B. Complaint and Supporting Proof Amply Sustain Recovery.

1. *Bond Is Enforcible In Accordance With Its Terms and Intent, As On a Common Law Bond.*
2. *The Failure to File the Bond or Procure a License is Immaterial and Cannot Defeat Recovery.*
3. *The Intent of the Parties Under the Bond Was to Protect The Storage of Beans and, If Necessary, the Bond Should Be Reformed Accordingly.*
4. *Chatterton & Con Is Not an Indispensable Party.*
5. *The Action is Properly Brought in the Name of the State of Montana Under the Terms of the Bond.*
6. *The Evidence Establishes Breach of the Conditions of the Bond and Loss and Damages Exceeding the Penalty Thereof.*

A. The Court Did Not Err In Permitting Complaint To Be Amended.

1. *Amendments Constitute No Material Departure.*

Without justification for it, with no reference to the pleadings whatsoever, appellant's brief proceeds upon the theory and assumption that the bond here sued upon was issued under the authority of Section 3589 of the Revised Codes of Montana, or some other statute, and that the action was originally brought under such statute. That statute is referred to in the brief as the Montana Warehouse Statute. This is the statute that concerns the storage of grain. It has not the slightest application here and is wholly foreign to any of the matters at issue. There

is nothing in either the original or amended complaint that ties into the statutes dealing with the storage of grain. Let it be understood at the outset that appellees do not now and never have placed any reliance upon or have in any way been concerned with those statutes.

Nor was the original complaint or the amended complaint brought upon or based upon any other statute. The reference to any of these statutes in this connection can be designed only to confuse, or to specially suit the purposes and argument of appellant. They are a red herring across the trail.

Whatever may be said in criticism of the original complaint, whether or not it be a model form of pleading, a search thereof will not disclose the slightest reference to any statute nor the right to conclude that it was based upon or relied upon the authority of any statute. It states that Chatterton & Son was operating a public warehouse for storing beans (Par. 1, Tr. 3); that defendant was fully informed thereof and executed the bond in consideration thereof (Par. 5, Tr. 5); and that Chatterton & Son held itself out to the growers of beans and represented that its warehouse was duly bonded (Par. 10, Tr. 6-7). These are all proper allegations for supporting recovery as on a common law bond.

It is true that the complaint states more in this connection. Reference is made to the Commissioner of Agriculture that the bond was filed with him, that a further consideration for the bond was to qualify Chatterton & Son to conduct a warehouse, and that upon breach of the bond the Department of Agriculture demanded payment of the bond.

None of these allegations, however, warrant the cataloging

of the complaint as one based upon any special statute and no one has the right to say that it is based upon any special statute or needs a special statute to support it. At best it might have been claimed that the complaint was demurrable for uncertainty. In truth, it contains allegations which could not be proved and which the actual proof did not support in all respects, which in itself explains, in part, the amendments. However that may be, it is suggested that even without amendments the complaint would have stood the test upon the trial, under the proof as offered, and would have survived an attack upon the ground of fatal variance.

Reference is made by appellant to the Agricultural Seeds Act, Sections 3592.1 to 3592.9, Revised Codes of Montana. We make no claim that commercial beans, as distinguished from seed beans, are within the contemplation of the act. Clearly the act does not include commercial beans generally. However that may be, neither the original complaint nor the amended complaint is grounded upon that act. Whatever doubt there may have been from the allegations as they appeared in the original complaint, however confusing the theory of the pleader may have been (if these allegations may be said to be confusing), it may not be said that the original complaint was grounded upon any statute or that it depended for its substance upon any statute. Certainly the amended complaint left no doubt and in undisguisable terms pleaded facts sustaining recovery as upon a common law bond.

The reference in appellant's brief to the Act passed by the Montana Legislature in 1933, after this bond was written and all of the events alleged in the complaint had transpired, being an Act dealing with and regulating bean warehouses exclusively,

is entirely irrelevant. Equally irrelevant is the statement that the writer of this brief drafted that Act; a statement which is neither affirmed nor denied.

The argument, then, that there is here found a change from law to law is wholly unsupported. In fact, except for the allegations of mistake supporting reformation, in their essentials the two complaints are substantially the same, or at least contain substantially the same fundamental allegations. This can be demonstrated by laying the two complaints side by side. We find the following basic allegations found in each complaint:

1. Chatterton & Son were operating a warehouse for the storage of beans.

(Paragraph 1 of the original complaint)

(Paragraphs II and III of amended complaint, with more elaborate statements showing that beans alone and not grain were stored)

2. The bond was executed by defendant to indemnify the owners of beans stored in the warehouse.

(Paragraph 3 of original complaint)

(Paragraph IV of amended complaint)

3. Purpose of bond was to cover a bean warehouse.

(Paragraph 5 of original complaint, with the additional allegation that the bond was issued likewise to qualify Chatterton & Son to conduct such warehouse in the State of Montana)

(Paragraphs V and VI of amended complaint showing in greater detail the persuasive facts indicating the true intent and purpose and that the word "grain" was used instead of "beans" by mistake)

4. Chatterton & Son represented itself as bonded warehouse for storage of beans and the beans were stored on the faith thereof.

(Paragraph 10 of original complaint, with the additional allegation that Chatterton & Son also represented itself as licensed)

(Paragraphs VIII and XI of amended complaint, with additional allegations appearing in paragraph XII showing that holders of storage tickets relied upon bond and were ignorant of the mistake appearing therein)

5. Breach of the conditions.

(Paragraph 11 of original complaint)

(Paragraph XIV of amended complaint)

The prayer for relief in both instances is the same, except for the additional prayer for reformation found in the amended complaint.

2. Generally Amendments Are Favored and Should Be Liberally Allowed.

As governing amendments of pleadings generally, Rule 18 of the United States District Court for the District of Montana reads as follows:

> "Amendments of pleadings both in actions at law and suits in equity, except so far as otherwise provided for by act of Congress, or the Equity Rules, or by these rules, shall be governed by the laws of the State, as the the same shall exist at the time the application to amend is passed upon, which laws are, to the extent mentioned, hereby adopted as rules of this Court, both at law and in equity. - - - - ".

Section 9187 of the Revised Codes of Montana covers the subject and, so far as applicable, provides as follows:

> "The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the same of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer, reply, or demurrer. *The court may likewise, in its discretion, after notice to or in the presence of the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars;* - - - - "

A search of the Montana cases interpreting this statute will disclose no case where the Supreme Court of Montana has ever reversed the lower court for granting an amendment, although it has been reversed for refusal to do so.

State v. District Court, 99 Mont. 33, 43 P (2d) 249.

On the contrary, the Montana Supreme Court has uniformly sustained a liberal interpretation of the statute and, in conformity with the general rule, has held that a motion to amend is addressed to the sound judicial discretion of the trial court, and that the rule is to allow and the exception to deny amendments. The cases include amendments granted at all stages of the proceedings, including at the eve of trial, during the trial, and at the close of the evidence.

Sandeen v. Russell Lumber Co., 45 Mont. 273, 122 Pac. 913.

Cullen v. Western Mortgage & Warranty Co., 47 Mont. 513, 134 Pac. 302.

De Celles v. Casey, 48 Mont. 568, 573, 139 Pac. 586.

Fowlis v. Heinecke, 87 Mont. 117, 120, 287 Pac. 169.

Besse v. McHenry, 89 Mont. 520, 525, 300 Pac. 199.

Sellers v. Montana-Dakota Power Co., 99 Mont. 39, 41 Pac. (2d) 44.

Buhler v. Loftus, 53 Mont. 546, 559, 165 Pac. 601.

Clack v. Clack, et al., 98 Mont. 552, 41 Pac. (2d) 32.

Berthelote et al. v. Loy Oil Co. et al., 95 Mont. 434, 456, 28 Pac. (2d) 187.

In fact an amendment was upheld by the Supreme Court where the same was not offered until the jury had been sworn and notwithstanding that the amendment changed the issues entirely.

Apple v. Seaver, 70 Mont. 65, 223 Pac. 830.

Reference is also made to the general principles applying to amendments as stated in *Bancroft's Code Pleading,* Vol. 1, pp. 736-771. I quote from page 736:

> "Experience shows that in the attainment of justice by resort to judicial tribunals, amendments to pleadings are of ever recurring necessity; and the tendency of judicial decision should be, and is, towards liberality in permitting, in furtherance of justice, such amendments as facilitate the production of all the facts bearing upon the questions involved. The codes and the courts alike favor a broad liberality, rather than severely technical tendencies on this subject. Hence it is a rule generally that, in the furtherance of justice, amendments to pleadings should be liberally allowed;"

We quote from page 738:

> "A court may, however, refuse leave to amend where there is inexcusable delay in applying for permission, where it is obvious that an amendment could not be of

> any avail in stating a cause of action or defense as the case may be; where the desired amendments are clearly not material to the original case, where great inconvenience or an injustic to the adverse party must necessarily result therefrom, or where the amendment occasions surprise, or places opposing counsel at a disadvantage, unless these objections, as generally may be done, are obviated by granting a continuance, or by the imposition of such terms as the circumstances may justify."

If the delay in this case was inexcusable, that was for the trial court to say and a matter for its discretion.

We quote also from page 742:

> "Ordinarily a party should be permitted to amend so as to present for determination his legal rights, to express the cause of action originally intended; or to rectify a mistake. A court is rarely justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues or properly presented by the pleading."

We quote from page 755:

> "There is considerable conflict among the authorities as to the rules governing amendments in which new or independent causes of action or grounds of defense are introduced. The rule generally given is that amendments may be allowed to any extent, provided they do not substantially change the cause of action or introduce a new cause of action."

And from page 757:

> "All that can be required is, that a wholly new cause of action which is entirely foreign to the original cause of action, shall not be introduced, and that the plaintiff

cannot be allowed to strike out the entire substance and prayer of his complaint, and insert a new cause by way of amendment.

The reason for the rule prohibiting a change of a cause of action by amendment of the complaint is that a defendant may not be summoned to answer one cause of action and be required, on his appearance, to answer to another. But where the summons requires the defendant to answer the identical clause of action set forth in the amended complaint, the rule cannot apply, for in such case the defendant is neither misled nor surprised."

In many jurisdictions amendments are allowed before trial although they introduce an entirely new cause of action (Page 760).

We quote from *Rae v. Chicago, Milwaukee & St. Paul Railway Co., (N. D.,* 107 N. W. 197:

"The object of statutes of this character is to facilitate and insure a full, fair, and speedy determination of the actual claim or defense on the merits by requiring the court to permit the pleadings to be amended if for any reason they do not fully and fairly present all the facts essential to the real merits of the claim or defense. It is clear, therefore, that an amendment of the complaint is not objectionable merely because it introduces a new or different cause of action in the technical meaning of that term."

With particular reference to the facts in this case, reference is made to *Sec. 274a of the Judicial Code* (28 U. S. C. A. 387), relaxing the ancient rules governing the distinction between law and equity, from which we quote:

"In case any United States court shall find that a suit at law should have been brought in equity or a suit in

> equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form."

Equity Rule 23 provides as follows:

> "If in a suit in equity a matter ordinarily determinable at law arises such matter shall be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court."

The section of the Judicial Code above quoted has been liberally construed to show the intention to abolish tchnicalities and form and prevent a suit from becoming a game of skill; to obtain a speedy trial and conclusion of the issues, the paramount idea being that courts are established and maintained for the administration of justice rather than for an exhibition of technical skill.

7 Hughes Federal Practice 4443. 23 R. C. L. 357.

In *Liberty Oil Co. v. Condon Nat. Bank,* 260 U. S. 235, 43 Sup. Ct. Rep., where an equitable defense was raised in an action at law, the court said:

> "Under equity rule No. 22 a suit in equity which should have been brought at law must be transferred to the law side of the court. There is no corresponding provision in rule or statute which expressly directs this to be done when the action begun at law should have been

> by a bill on the equity side, but we think the power of the trial court to order a transfer in a case like this is implied from the broad language of Section 274b, above quoted, by which the defendant who files an equitable defense is to be given the same rights as if he had set them up in a bill of equity, and from Section 274a of the Judicial Code, quoted below, in which the court is directed, when a suit at law should have been brought in equity, to order amendments to the pleadings necessary to conform them to the proper practice. - - - To be sure, these sections do not create one form of civil action as do the Codes of Procedure in the states, but they manifest a purpose on the part of Congress to change from a suit at law to one in equity and the reverse with as little delay and as little insistence on form as possible, and are long steps towards Code practice."

See also *6 Hughes Federal Practice 3843* to the effect that a party to a suit has the right at any stage of the cause to amend his pleading so as to obviate the objection that his suit was not brought on the right side of the court.

With respect to reformation, under the general practice of courts of equity to give complete relief on all matters before them, it is the uniform rule that the party who seeks reformation in a court of equity may in the same court obtain the enforcement of the instrument as reformed, as at law, including money damages.

23 R. C. L. 357.

Thus it appears clearly that the technical objections attempted to be raised by appellant have no place in modern procedure. Even though the case be brought on the wrong side of the court, the court will quickly remedy that situation without penalty.

In any event, the question of the right to a trial by jury should not be involved here, because a jury was expressly waived in writing (Tr. 112).

3. Action Not Barred By Any Statute of Limitations.

What has been said above should dispose of any question of limitation of the action, without more, since the amended complaint does not present a new cause of action. The statutes referred to in appellant's brief do not fit this case, in any event. Section 9033, relating to an action on the ground of mistake, might appear to apply to an action for reformation. However this is not an action for reformation, but is still the same old action to recover on the bond, and reformation is only an incident thereof. As will be pointed out hereafter, and as was held by the trial court, reformation was unnecessary to enforce the bond and to give judgment for appellees.

Appellant's whole argument as relating to the statute of limitations, is predicated upon the assumption that the amended complaint states an entirely new and different cause of action and that that cause of action is for reformation. Thus, appellant's brief relies upon four tests indicated in 37 C. J. 1076. This citation is to the subject of Limitations of Actions as that subject is treated in Corpus Juris. The tests referred to are applied only for the purpose of determining whether there is a new cause of action such that it may be barred by the statute of limitations. Thus, quoting further from Corpus Juris on the following page (1077) the following appears:

> "In most of the adjudicated cases holding that the action was in fact commenced when he amendment was made

> and not when the action itself was commenced, the departure between the first and amended pleadings is said to be a change from law to law, and commonly arises where a cause of action under the common law is first asserted and after the period of limitation has expired a statutory action is relied upon;"

It can hardly be seriously urged that under these tests or otherwise the amended complaint states a new or different cause of action. With respect to the statute of limitations, or otherwise, the action is still upon the bond. The nature of a cause of action is to be determined from the object and purpose of the suit. If reformation be necessary before a contract can be enforced, since that does not require an independent action and full relief can be granted in one action under our practice, the reformation is a mere incident to the real object and purpose of the suit.

Union Ice Co. v. Doyle, (Cal.) 92 Pac. 112.

Banks v. Stockton, (Cal.) 87 Pac. 83

Murphy v. Crowley, (Cal.) 73 Pac. 820

Gardner v. California Guaranty Inv. Co., (Cal.) 69 Pac. 844

Oakland v. Carpentier, 13 Cal. 643

Goodnow v. Parker, (Cal.) 44 Pac. 738

Clausen v. Meister, (Cal.) 29 Pac. 232

The same courts hold that the statute of limitations applicable is the limitation applying to an action upon a contract. Thus this case is not an "action for relief on the ground of fraud or mistake," governed by a two year limitation. In fact the matter of the statute of limitations is in no way involved in this case.

Nor is the citation from Volume 7, Cyclopedia of Federal Procedure, Section 3538, cited at page 26 of appellant's brief, any authority to the contrary. As will be noted from the quotation, it is where the *recovery* upon a note is barred, that the statute may be availed of. That means the cause of action upon the note, not for the equitable relief of reformation. And so in the case of *Bank of U. S. v. Daniel,* 12 Pet. 32, 9 L. Ed. 989, cited at this point in the brief, the statute held applicable was the one applying to the cause for the recovery of money and not for reformation.

If this cause of action were held to have been changed so as to now make it one for reformation, then, under the Federal Conformity Act (28 U. S. C. A. 724) excepting equity and admiralty causes from conformity with state practice, the Montana statutes of limitations would have no application here.

25 C. J. 849-851

21 C. J. 251-257

One other matter dealt with in appellant's brief under this head should be cleared up. It is there argued that in the amended complaint it is alleged that Chatterton & Son never qualified to do business in the State of Montana, which appellant construes to mean that the company never qualified as a warehouseman. This, of course, is not the meaning and not the statement. It refers, of course, to the failure of Chatterton & Son, as a foreign corporation, to file its articles of incorporation with the Secretary of State and otherwise conform to the requirements of Section 6651 of the Revised Codes of Monana, to entitle it to do business in the State generally. Thus the corporation "qualifies" under the state laws to do business as a cor-

poration, and that is what is stated in paragraph II of the amended complaint.

Likewise the use of the term "public warehouse" and "public warehouseman" does not give appellant's counsel the right to conclude that a grain warehouse is intended. The statute quoted in the brief defining the terms is a part of the Grain Warehousing Act and, of course, the definition is given only for the purposes of the Act and to indicate what is meant when the term is used elsewhere in the Act. Otherwise a public warehouse is still a public warehouse in Montana, and that applies whether the term appears in the pleadings, in the application for the bond or the bond itself.

B. Complaint and Supporting Proof Amply Sustain Recovery.

1. *Bond Is Enforcible in Accordance With Its Terms and Intent, As On a Common Law Bond.*

With respect to defendant's motion to dismiss complaint, plaintiffs' motion to strike affirmative matter from answer, and plaintiffs' right to recover generally under the pleading and proof, the same questions of law are involved. They will therefore not be treated separately.

There can be and there is no argument of the defalcation of Chatterton & Son and its liability for the conversion of said beans. Its liability far exceeds the penalty of said bond. There can be no question that this bond was procured and was written to protect against that very liability.

The bond names as obligee and runs to the State of Montana

"for the benefit of all parties concerned." The bond is conditioned that "Chatterton & Son shall indemnify the owners of grain stored in said warehouse against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture."

The warehouse, of course, was operated for the storage of beans alone and that was the sole business of Chatterton & Son at Billings. Nothing else had ever been stored there and it was not intended to store anything else there, and the bond was a nullity if it did not indemnify the owners of beans.

For present purposes, we are in no way concerned with the question as to whether the statutes provided for the regulation of the bean warehousing business or prescribed a license and required a bond. The cause of action here, as the complaint is framed, is for recovery upon the common law liability under the bond. That is to say the plaintiffs seek to recover upon the plain implication and force of the bond and the language there used, as under the common law, without respect to any statute which may or may not require such a bond. Furthermore, the theory of the complaint and supporting proof is that the bond was procured, not to comply with any statute nor for the purpose of obtaining a license under a statute, but in order to afford protection to the depositors of beans and to serve as an inducement to prospective depositors to store their beans with safety and security.

The bond here must be distinguished from a bond signed by personal, individual sureties. The rules governing corporate sureties are now clearly differentiated by the courts. Surety

bonds, written by a corporate surety, for compensation in the form of a premium, are no longer governed by the rules of suretyship. Such corporate sureties are not favorites of the law, as are voluntary sureties. Their contracts are construed most strongly against them and in favor of the indemnity which the obligee has reasonable grounds to expect. This new, more modern rule, has now become so firmly established and recognized that citation of authority seems hardly necessary. Reference is here made to the exhaustive annotation upon the subject appearing in 12 A. L. R. 382 and again in 94 A. L. R. 876. We quote from a few of the cases only:

> "The universal rule is that in construing the bond of a surety company, acting for compensation, the contract is construed most strongly against the surety, and in favor of the indemnity which the obligee has reasonable grounds to expect. Such contracts are generally regarded as contracts of insurance, and are construed most strictly against the surety."
>
> *Montana Auto Finance Corp. v. Federal Surety Co.* 85 Mont. 149, 278 Pac. 116.
>
> *State v. American Surety Co.,* 78 Mont. 504, 255 Pac. 1063.
>
> "Unlike an ordinary private surety, a surety of the character here involved which accepts money consideration has the power to and does fix the amount of its premium so as to cover financial responsibility. This class of suretyships, therefore, is not regarded as a 'favorite of the law.' Bryant v. Amer. Bonding Co. 77 Ohio St. 90, 99, 82 N. E. 960, 961. And if the terms of the surety contract are susceptible of two constructions, that one should be adopted, if consistent with the purpose

to be accomplished, which is most favorable to the beneficiary."

Royal Indemnity Co. v. Northern Ohio Granite & Stone Co., (Ohio) 126 N. E. 405.

"The very reason for the existence of this kind of corporation ,and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their superior means and facilities, they are to be permitted to take the risks, but avoid the losses by the rule of strictissimi juris, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute."

Atlantic Trust & D. Co. v. Laurinburg, 163 Fed. 690, 695.

"The deep solicitude of the law for the welfare of voluntary parties who bound themselves from purely disinterested motives never comprehended the protection of pecuniary enterprises organized for the express purpose of engaging in the business of suretyship for profit. To allow such companies to collect and retain premiums for their services, graded according to the nature and extent of the risk, and then to repudiate their obligations on slight pretexts, that have no relation to the risk, would be most unjust and immoral, and would be a perversion of the wise and just rules designed for the protection of voluntary sureties. The contracts of surety companies are contracts of indemnity, applicable to contracts of insurance."

Rule v. Anderson (Mo.) 142 S. W. 358, 362.

"The rule is well settled in this circuit that a compensated surety is in effect an insurer, that its contract will be construed as an insurance contract most strongly in favor of the party or parties protected thereby, that forfeiture on technical grounds will not be favored, and that the strictissimi juris rule of the law of suretyship will not be applied for its protection."

Maryland Casualty Co. v. Fowler, 31 F. (2d) 881.

"Paid sureties understand that they are not regarded as considerately or sympathetically as were the gratuitous sureties of the common law, but they are left in doubt as to the extent to which that consideration is withdrawn. The number of cases coming to the courts, in which paid sureties are urging their complete discharge by reason of some infraction of the contract on the part of the indemnified, suggests that a more specific rule concerning their rights and liabilities be stated. It is believed that rule will be easy to discover, if such contracts be consistently treated (as they have often been declared to be) as insurance contracts, rather than the common-law surety contracts. It is true that such contracts retain the form of surety contracts. But the principles governing the liability of sureties did not spring from the form of the contract, but rather from the relations of the parties to such contracts; and a striking change in that relation exists where the obligation of the surety, once gratuitously assumed, is now assumed as a source of profit. While the contract between the parties should govern their rights and liabilities, such contract should no longer be construed strictly in favor of the surety. This has often been declared. It would seem, too, that not every circumstance prejudicial to the interests of the surety should work a total discharge of

the surety, without any reference or consideration to the extent to which the interests of the surety were in fact prejudiced by such circumstance. - - - "

Maryland Casualty Co. v. Eagle River Union Free High School Dist. (Wis.) 205 N. W. 926, 928.

"And in general, as the contracts of surety companies are essentially contracts of indemnity, the courts ordinarily apply to them by analogy the rules of construction applicable to contracts of insurance. Hence, in an action on a bond written by a surety company, if the bond is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that which is most favorable to the insured will be adopted."

Title & T. Co. v. United States Fidelity & G. Co. (Or.), 1 Pac. (2d) 1100, 1103.

See also:

Murray City v. Banks (Utah), 219 Pac. 246.

Lassetter v. Becker (Ariz.), 224 Pac. 810.

Viewing the bond as thus in the nature of an insurance contract, Chatterton & Son was merely a perfunctory signer. There was no need for that company to sign the bond. The liability of Chatterton & Son to the bean growers was grounded upon its common law liability as a warehouseman and bailee. It grew out of the relationship of the parties. Thus the appellant became the insurer and the bean growers the insured, Chatterton & Son being merely the person who supplied the premium for the insurance. The inducement to Chatterton & Son was the hope thereby to draw customers. Under this view, there would certainly appear to be no good reason why Chatterton & Son should be a party to the action.

It is argued that the bond was not delivered, and therefore

did not become effective. After being executed by Chatterton & Son and the bonding company, it was promptly mailed to the manager of the warehouse at Billings (Tr. 167). The manager (Mr. Healow), from the beginning, published to his prospective customers and advertised the fact that he had the bond and that the warehouse was bonded and offered the bond as an inducement to growers to store their beans in the warehouse (Tr. 134, 155, 183, 184, 185, 186). The growers relied upon such representation (Tr. 183, 184, 185, 186). Six months later, notwithstanding that the bond had not been filed, appellant issued its continuation certificate continuing the bond in force for another year and forwarded the same to the "Secretary of Agriculture" at Billings promptly (Tr. 167). However the continuation certificate was received by Healow at Billings and kept by him (Tr. 136). By thus issuing and transmitting the continuation certificate, notwithstanding that a license had not been issued upon the original bond, the appellant recognized and acknowledged the bond to be effective. On December 6, 1930, over the corporate seal of appellant, appellant expressly acknowledged that the bond was effective and outstanding and confirmed the same (Plf. Ex. 1, Tr. 179). In subsequent letters appellant, through its agent, likewise acknowledged the bond to be effective and outstanding and, when informed that the continuation certificate had become lost, supplied a copy thereof and transmitted it to the Commissioner of Agriculture (Tr. 171). Under the law, there is here abundant proof that the bond was delivered and effective. Certainly appellant is estopped from denying the same.

"Except where there is a statutory provision or order

> of court designating the mode of delivery, there is no precise or set form in which the delivery of a bond must be made; it is sufficient if it is made by any acts or words which show an intention on the part of the obligor to perfect the instrument and to make it at once the property of the obligee; and this may be accomplished, although the bond does not come into the actual possession of the obligee. The strict rules relating to delivery of deeds do not apply to bonds."
>
> 9 C. J. 17.

Even as to written and formal contracts generally, the question of delivery is a question of intention, requiring only an actual relinquishment of the custody or control of the instrument, and in most jurisdictions "the only thing essential to delivery is some manifestation by word or act on the part of the obligor that the instrument is to be immediately binding."

I Williston on Contracts, Sec. 211.

The rule is stated in the Restatement of the Law of Contracts, Sec. 102, as follows:

> "A promise under seal is delivered unconditionally when the promisor puts it out of his possession with the apparent intent to create immediately a contract under seal, unless the promisee then knows that the consignor has not such actual intent."

The bond is conditioned that "Chatterton & Son shall indemnify the owners of grain stored in said warehouses against loss and faithfully perform all the duties of and as a Public Warehouseman and fully comply in every respect with all the laws of the State of Montana and the regulations of the Department of Agriculture heretofore enacted or to be enacted hereafter in relation to the business of Public Warehouseman,".

It contains no provision or condition that a license be issued. That appellant intended to bind itself to underwrite and stand back of Chatterton & Son as such warehouseman to fulfill its duties and obligations as such warehouseman, cannot be doubted. The contract is plain. Appellant now merely seeks to evade and to avoid its responsibilities and clear contract obligations. The attempt to avoid is not based upon reason or the claim that the intent to bind itself is not present, but upon the purely technical ground that the law exacted of the principal, Chatterton & Son, that the bond be filed, and that it never was filed. Nowhere in appellant's brief is there any suggestion that a valid and effective bond cannot be given for a warehouseman, to guarantee performance of his duties, without any law providing for the bonding of warehouses and without any repository provided for by law. No reason or authority is cited to question the force of any such bond.

Furthermore, while the State of Montana is named as the nominal obligee the true beneficiaries named in the bond are the depositors of beans, as the "parties concerned." In fact they are expressly referred to in the condition clause of the bond as "the owners of grain stored in said warehouses." (Tr. 14).

> "A statutory bond may be good as a common-law obligation, although insufficient under the statute because of noncompliance with its requirements, provided it is entered into voluntarily and on a valid consideration and does not violate public policy or contravene any statute. But this rule cannot be extended to cases in which to hold the parties liable as on a bond at common law would be to charge them with liabilities and obliga-

> tions greater than, or different from, those which they assumed in the instrument executed by them. Moreover, in order to uphold a bond as a valid common-law obligation on which a recovery may be had as such, it must be done independently of the statute by the authority of which it was intended to be executed."
>
> 9 C. J. 27.
>
> "A bond, whether required by statute or order of court or not, is good at common law if it is entered into voluntarily by competent parties for a valid consideration, and is not repugnant to the letter or policy of the law; and such a bond, other than an official bond, is enforceable according to its conditions, although they are more onerous than would have been required if a statutory bond had been given for the same purpose."
>
> 9 C. J. 29.

In *American Surety Co. v. Butler,* 86 Mont. 584, 284 Pac. 1011, involving a bond given under the Grain Warehousing Act, the bond was referred to as not the statutory bond, because in excess of the statutory requirements, but a common-law bond executed in lieu of the statutory bond.

In *Palmer v. Vance,* 13 Cal. 553, recovery was sustained upon a redelivery bond upon attachment, notwithstanding that it was held that the bond was not required by statute, the bond being held valid as a common-law obligation for the payment of money, being upon a sufficient consideration; the court saying:

> "A bond taken by the sheriff is not void for want of conformity to the requirement of the statute, which, while prescribing one form of action, does not prohibit others; and a bond given voluntarily upon the delivery of property is valid at common-law."

In *Baker v. Bartol,* 7 Cal. 551, the bond sued upon was exacted by a court in a receivership proceeding from the defendant in that proceeding to avoid the appointment of a receiver. The bond ran to the state, but the suit on the bond was brought directly by the beneficiary. It was held that the bond was voluntary and good at common law notwithstanding that the court had no right to require the bond; that having received the benefit of the court's order, the surety was estopped from denying the legality of the bond.

In the case of *State to Use of Benton County v. Wood,* (Ark.) 10 S. W. 624, the bond involved was a county treasurer's bond. No obligee was named in the bond, but it was held that recovery could be had in the name of the state; that technicalities could be brushed aside and the bond construed like any other contract in writing according to its plain intent, although not fully and particularly expressed; that the condition which shows the design of the bond is the important requirement and the naming of the obligee is the "merest formality." We quote further from the opinion:

> "It needs no statute to enable an officer to give a valid bond for the faithful payment of money that may come to his hands, and, if we regard the bond in suit as a common law obligation without looking for aid to the statute which the parties undertook to follow in drafting it, it will be seen that the fair import of the language used is that the bond was intended for the benefit of all whom it might concern; that is, anyone who should be injured by the treasurer's official delinquency."

To the same effect see the case of *Bay County v. Brock,* (Mich.) 6 N. W. 101.

In the case of *People to Use of Houghton v. Newberry,* (Mich.) 116 N. W. 419, a contractor's bond was involved which was conditioned, among other things, that all debts contracted by the principal for labor or material would be discharged. The bond recited that it was given pursuant to a certain named statute. The action was by a materialman. It was held that the statute did not require the bond but recovery was allowed none the less upon common law principles, holding that the surety evidenced the intention to make the bond effective for the use of any party interested, which was equivalent to a proposal to such party to guarantee payment of his account, which proposal, it was held, the use plaintiff accepted. We quote from the opinion:

> "It is true that the law did not require this proposal to be made. But that circumstance is unimportant. Appellant made it. The case would be very different if the bond had stated that liability was conditioned upon the applicability of the statute to the contract therein described."

In *Finley v. City of Tucson,* (Ariz.) 60 Pac. 872, the bond was given by the successful contestant for a city office in an election contest, its condition being to refund the salary paid in case of reversal on appeal. Recovery was allowed notwithstanding that there was no statute authorizing such a bond.

In *Bowen v. Lovewell,* (Ark.) 177 S. W. 929, the bond was given by the contestee in an election contest who had been unsuccessful in the lower court but had appealed. The governor, as a condition to issuing his commission to the contestee, exacted the bond, wherein the sureties agreed, in consideration of the

issuance of the commission, to pay to the contestant all emoluments of the office if it was finally determined on appeal that the contestant was entitled thereto. No obligee was directly named in the bond. None the less, in a suit by the contestant, recovery was allowed, the court holding contestant was a privy to the bond upon the ground that by express terms he was named as beneficiary. It was also held that the bond was not without consideration and was not extorted for the reason that the contestee was not entitled to the commission under the statute. Thus the contestee got what he was not entitled to, thereby affording a sufficient consideration for the bond.

In *LaCrosse Lumber Co. v. Schwarz,* (Mo.) 147 S. W. 501, the bond was given to protect laborers and materialmen upon a public contract job, but no such bond was authorized or required by statute. It was held that though the bond was voluntary and not authorized by statute it was valid since it did not contravene public policy nor violate any statute and that it could be enforced by a third person for whose benefit the bond was clearly made, as well as by the state.

In *Braithwaite v. Jordan,* (N. D.) 65 N. W. 701, the bond involved was a bond on appeal which was not in the form as provided by statute, but recovery was allowed as upon a common law obligation.

The case of *State v. Cochrane,* (Mo.) 175 S. W. 599, is very similar in its facts. The laws of Missouri required a grain elevator to furnish bond and obtain a license and submit to regulation. This law, or certain sections thereof, had been declared unconstitutional. An elevator company had applied for a license

under the law and furnished the bond as a condition to the issuance of the license. The condition of the bond was that the licensee should faithfully perform his duty as a public warehouseman under the laws of the state and comply with the laws of the state relating to public warehousemen, together with other conditions. The statutes under which the bond was issued were held to be unconstitutional and therefore to have no application or force, but notwithstanding, it was held that the bond was valid and enforceable as a common law bond. It was further held that a beneficiary, though not named in the bond, might sue in the name of the state. The action was entitled as is our action, "State for the use of etc.". We quote from the opinion:

> "It (the bond) was executed by appellant for a price paid or promised. The surety company desired a premium and, to gain that, executed the bond in suit. It had no other relationship to the business conducted by the Cochrane Grain Company and no connection with its occupation than for an agreed consideration to indemnify the public against the breach of certain duties imposed upon its principal by law. It entered into that contract without any other coercion than a motive of profit - - - *If no statute had ever been enacted regulating that business (public warehouseman) the common law obligations would still subsist.* Hence, if we should concede for the argument only that all statutory provisions on the subject are at an end, still the duty was imposed upon the principal by the nature of his business and his receipt for the goods to surrender the property upon proper demand or to show a valid reason for refusal. *The fact that the bond in question embodied conditions to comply with the statutory regulations does not prevent the enforcement of other obligations expressed,, which, though*

not prescribed by statute, were the common law duties attached to the business of public warehouseman. - - -

"It is a settled principle of law in this state that a voluntary bond not opposed to public policy and resting on a sufficient consideration is enforcible or binding as a common law obligation - - -

"The trend of judicial decision, as well as the object of the statutes are to compel the rigid observance of contracts of indemnity made by corporations licensed to engage in that business for profit - - - Such suretyships, being for a gainful purpose, do not logically fall in the category of sureties for accommodation, who are favorites in the administration of the law, and are exonerated in all cases where a strict construction of their contract does not bring them within its provision."

The italics are ours.

Thus it will be seen from this last case, as in the principle involved in all of the cases, the filing or lack of filing of the bond is of no censequence. The Missouri statutes having been declared unconstitutional, there was no statutory provision or authority for filing the bond. Consequently any attempt at filing was of no effect and there was no legal filing. So also as to the suit in the name of the State of Missouri. The court encountered no difficulty in justifying a suit in the name of the state notwithstanding that there were no valid statutes which gave the state any authority to receive such a bond or to enforce it. All technicalities are brushed aside and the bond is enforced according to its tenor and effect.

2. *The Failure to File the Bond or Procure a License is Immaterial and Cannot Defeat Recovery.*

As can be seen from the foregoing, the bond need be filed with no one in order to make it effective. If the bond is good in accordance with its terms and has been issued and put forth with the intent to make it effective, then certainly no other conditions can be attached which are not expressed in the bond, and to say that the bond must be filed with the Commissioner of Agriculture or with any other state authority, is to state an absurdity and to seek for excuses merely, wholly without warrant.

This precise point was before the Montana Supreme Court in *Pue v. Wheeler,* 78 Mont. 516, 255 Pac. 1043. The suit was upon a bond given for the release of attached property. Defendant pleaded failure of consideration upon the ground that the bond was not filed with the clerk of court and that it was not in the statutory form. The court disposed of this defense as follows:

> "If not good as a statutory undertaking, it is good as a common-law bond, to be measured by the plain wording of its terms. - - - Irregularities of procedure do not invalidate it. - - -
>
> There is no merit in the contention of lack of consideration. Defendants got that for which they executed the undertaking, return to attachement debtor of his property, and they may not complain of lack of consideration."

The plea that the bond must be filed is again founded upon the assumption that this action must be grounded upon a statute and that appellant can escape liability if its principal, Chatterton & Son, does not strictly obey the statute. This action, however, is not predicated upon any statute. The liability here sought to

be enforced is founded upon the plain import of the language of the bond and the circumstances under which it was written. The consideration for the bond is not found in any statute or in any requirements of statutes that a license be obtained, or in the actual procurement of any license. Consideration, rather, is found in the premium exacted for the bond ($100.00) and in the inducement offered to bean growers by the security of the bond, and in the benefit afforded to the principal in thereby being able to attract business.

It is argued that the bonding company was in some manner injured because the bond was not properly filed and because a license was not issued. Just why the appellant was thus injuriously affected, is not made clear. Certainly the filing itself would in no way advantage appellant and the failure to file could in no way do injury nor increase the liability. Nor would the issuance of a license alter the situation. Licensing implies permission or authority to do business. Certainly the risk of the surety would in no way be decreased when the state officially grants authority or gives license to do business. Licensing does not imply supervision, and supervision does not depend upon licensing. If by the state law the Commissioner of Agriculture was authorized or directed to supervise such warehouses, his hand would certainly not be stayed because he had not first issued a license. In fact if a license had not been issued and was required, the first act of supervision would require that he close the warehouse and prevent the doing of business. Thus the very failure to issue a license would prevent business and thereby avoid liability to the surety.

Nor does appellant's counsel enlighten us as to why the bond-

ing company should assume that Chatterton & Son would operate as and be supervised as a grain warehouseman alone. The testimony shows that the agent who wrote the bond knew that they handled beans alone in this warehouse and the court so found, as will hereafter be pointed out. There is not one word of testimony indicating that any representations were made to the bonding company as to the purpose of the bond, other than the application therefor, and that discloses nothing except that a public warehouseman's bond is required. Most of the questions are left blank, further demonstrating that the agent was entirely familiar with the business of Chatterton & Son and the purpose of the bond (Tr. 95-98). For that matter, we find no regulatory powers indicated in the Grain Warehouseman's Act which might have prevented this loss and defalcation. Furthermore, the testimony shows that the Commissioner of Agriculture did interest himself in the affairs of this warehouse and made inquiries and required statements. He could have done nothing more had a license been issued. The loss would have followed as inevitably.

What has been said under this head disposes of the action of the court in striking the affirmative defenses from the answer, (Specification of Error No. IV) and, as well, the rulings of the court sustaining objections to defendant's questions. The rulings of the court complained of involved the cross examination of the witness Healow (Specifications No. X, XII.). These special defenses and these questions involved the matter of the filing of the bond and the failure to obtain a license. They challenge the very legal issue upon which we stand. To permit the defenses to stand or to permit the evidence to go in would

defeat recovery. That is the whole issue here at stake. It must be plain enough, and has been from the beginning, that appellees stand upon the proposition that the bond need not have been filed and a license need not be issued. Recovery is sought as upon a common law bond, and upon that proposition only.

In passing, however, it may be noted that with respect to the exclusion of evidence, appellant made no offer of proof and did not protect his record in that respect. He cannot complaint, in any event, for the exclusion of evidence.

3. The Intent of the Parties Under the Bond Was to Protect The Storage of Beans and, If Necessary, the Bond Should Be Reformed Accordingly.

The word "grain" is defined in Webster's New International Dictionary as follows:

> "A single small hard seed. - - - collectively: a. The unhusked or the threshed seeds or fruits of various food plants, now usually, specif. the serial grasses, but in commercial and statutory usuage (as in insurance policies, trade lists, etc.) also flax, peas, sugar-cane seed, etc."

Broadly, then, it would seem that the word could include beans when, in the condition of the bond, the "owners of grain stored in said warehouses" are indemnified. Remembering that all parties concerned knew that this warehouse was for the storage of beans alone, and the storage of wheat or other similar grain was in no way involved, it must be assumed that the word was used in its broadest sense.

Reference is here made to the statutes of Montana governing interpretation of contracts. As provided by *Section 7527* a con-

tract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contract. By *Section 7531* it is provided that when, through fraud, mistake or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded. By *Section 7534* it is provided that a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done, without violating the intention of the parties. So by *Section 7538* a contract may be explained by reference to the circumstances under which it was made. By *Section 7545* where uncertainty is not removed by other rules of interpretation, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, and the promisor is presumed to be such party. And by *Section 7547* all things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom.

Attention is called to the case of *McDonald v. McNinch,* 63 Mont. 308. The contract there involved was a lease on shares. The lessor attempted to avoid the lease upon the ground that it was void for uncertainty in failing to provide who should bear the expense of putting in the crop or preparing the ground or harvesting the same, etc. The contract was silent as to these matters. The court said:

> "From the fact that plaintiffs (lessees) were to have possession of the lands and personal property for the purpose of producing crops upon the land, it is implied that they were to do all work, furnish all materials, and

> pay all expenses necessary to that end, except insofar as defendants bound themselves specifically to do part of the work, furnish part of the materials, or pay part of the expenses, - - - "

The court held the contract to be subject to interpretation and that it was not void for uncertainty. No question of reformation was raised, notwithstanding that the contract clearly did not contain all terms required for its proper execution.

Moreover this bond does not merely "indemnify the owners of grain stored in said warehouses," but further requires that the principal, Chatterton & Son, shall "faithfully perform all the duties of and as a public warehouseman and fully comply in every respect with all the laws of the State of Montana." The laws of this state as governing warehousemen are covered by the chapter on Deposit For Hire (Sections 7660 and following). The depositary is bound to return the identical thing deposited (Section 7640). The depositary must deliver the thing deposited to the person for whose benefit it was deposited, on demand (Section 7642).

The relationship between the warehouseman and the owner of the goods stored is that of bailor and bailee for hire.

67 C. J. 452.

Among the duties of a warehouseman is the duty to deliver the goods on reasonable demand.

67 C. J. 453.

Thus, whether "grain" as used in this bond includes beans or not, Chatterton & Son did not "perform all the duties of and as a public warehouseman." And Chatterton & Son did not "fully comply in every respect with all the laws of the State

of Montana." Nor need we search so carefully for the precise words contained in the bond to fix liability upon appellant. The intent of the parties is clear, both from the language used in the bond and the circumstances. Chatterton & Son wanted a bond for their Billings warehouse so that they could advertise themselves as a bonded warehouse and offer it as an inducement to prospective depositors, as well as the natural and commendable desire to protect thir depositors. Appellant was engaged in the business of furnishing such bonds and, giving appellant company all of the best of it, and resolving every issue in its favor, at the very least its agent made no effort to inquire into the kind of commodities that were to be stored in the warehouse, contenting himself with his general knowledge of his client's business, which he knew included the warehousing of beans. In fact he knew that the business of Chatterton & Son in its Billings warehouse was beans exclusively (Tr. 192). It is true that he denied, in his deposition, that he intended the bond to protect the owners of beans instead of grain, but the court resolved this issue against appellant and found that, at the time the bond was written, the agent knew that Chatterton & Son were engaged exclusively in the bean business at Billings and that it operated a warehouse there exclusively for the storage of beans (Tr. 119) and that the bond was intended to indemnify the owners of beans (Tr. 120). The finding of the court upon this disputed issue of fact can hardly be disturbed on appeal. The finding is amply supported by testimony.

In his deposition, the agent admitted that he was familiar with the character of the business of Chatterton & Son and knew that it was engaged in the bean business and was reputed

to be one of the largest bean jobbers in the country. Notwithstanding that his deposition was taken long after the deposition of Mr. Chatterton (who testified that the agent knew the company was engaged exclusively in the bean business at Billings), the agent in his deposition did not deny that he knew that fact. Furthermore he admitted, with respect to the statement in the application for the bond that it was sought as a public warehouseman's bond, that he did not inquire particularly as to what kind of a warehouse was there meant or for the storage of what kind of goods or property, but explained that it was his general impression that "various commodities" were to be stored in the warehouse (Tr. 248-249). Various commodities could of course include beans. We thus have the agent admitting that he understood that the bond, given upon a public warehouse, would protect the "various commodities" there stored.

The agent further admitted in his deposition that it was of no interest to him, in supplying the bond, whether beans or grain were to be stored in the warehouse (Tr. 248). He also admitted that it would make no difference to him in furnishing the bond (Tr. 249).

Aside from the agent's actual knowledge of the business of Chatterton & Son, it is a general principle of law that an insurer is charged with knowledge of the business of the warehouseman insured and its nature.

Indem. Ins. Co. of No. Am. v. Archibald, (Tex.) 299 S. W. 340.

It is also a general rule of law that if the warehouseman may be held liable on the bond, the surety is also liable thereon.

67 C. J. 459.

Thus the surety, as well as the warehouseman, may be held liable on the bond for any act of conversion on the part of the warehouseman.

67 C. J. 460.

It does not appear to us that reformation of the bond is necessary, and we believe that the court's holding in that respect is correct. However reformation is eminently proper and is supported by the evidence. We cite the Court to the following evidence in that respect:

Healow testified that he asked the Lansing office to procure the bond *for the protection of the growers* (Tr. 131). At his request the Lansing office of Chatterton & Son procured the bond through the agent who had for many years been doing the company's bonding business. As before stated, this agent knew intimately the officers of Chatterton & Son and knew that their business was particularly the bean business and the business at Billings exclusively the bean business. We have then here positive and authoritative testimony that the bonding company, through its representatives, knew that the bond here sought and required was for the storage of beans and beans alone. The principal and surety thus alike knew they were dealing only with beans. Therefore they intended beans.

Apparently no one gave any attention to the form of the bond. The conclusion is thus inevitable that the bond as written, containing the word "grain" (if "grain" does not include "beans") does not express the intention of the parties and the use of the word "grain" was inadvertent and a mutual mistake and the bond should be reformed accordingly. The court so found and

we submit its finding in this respect is amply supported by the testimony.

The case of *Commercial Casualty Ins. Co. v. Lawhead,* 62 Fed. (2d) 928, is very much in point on this question, as well as upon other matters involved in this case. The bond there involved was given to indemnify the plaintiff against the loss of a deposit in a bank upon a time certificate of deposit. By mistake the wrong printed form of bond was used, referring to a deposit subject to check instead of a time certificate of deposit. The action was originally brought at law and recovery denied upon the first trial in the lower court, upon the ground that the condition of the bond did not cover the loss. Upon appeal the Circuit Court of Appeals remanded the cause with instructions to transfer the case to the equity side of the court with leave to amend appropriately for reformation. Upon the second trial judgment went for the plaintiff, which was sustained upon appeal. The Circuit Court of Appeals held that if this bond did not secure the deposit in question, it never secured anything and defendant received a premium for nothing; that there was no doubt that both plaintiff and the bank intended and understood the bond guaranteed this specific deposit; that the printed form used was apparently not appropriate to express the true purpose; and that defendant bonding company should not be "allowed to escape liability because of the mistake in reducing the contract to writing or selecting the form of bond to be used;".

This case is also very much in point upon the question as to whether Chatterton & Son should be joined as a defendant, covered in our next subject head. The principal in the bond

was the bank referred to, a Pennsylvania corporation. The suit arose in West Virginia. The objection was made, as here, that the bank was a necessary party to the suit, after reformation was requested, and that without the bank as a party the court was without power to decree reformation. The decree in this case had provided that, upon payment of the liability of the bond by defendant, the complainant should be required to assign the certificate of deposit to the defendant. Aside from this, the Circuit Court of Appeals in its opinion said:

> "We think that the bank and its receiver fall within the classification of conditionally necessary but not indispensable parties, i. e. of parties who have an interest in the controversy, but one which is separable from that of the parties before the Court and will not be affected by a decree entered in their absence."

The court then quoted from *Halpin v. Savanah River Electric Co.*, 41 Fed. (2d) 329, classifying parties as, (1) Proper parties, (2) Conditionally necessary parties and (3) Indispensable parties, the first two of which need not be joined if beyond the jurisdiction of the court or if their joinder would result in ousting the jurisdiction. The court also quoted from *Silver King Coalition Mines Co. v. Silver King Consol. Mining Co.*, 204 Fed. 166, as follows:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject matter which

which is separable from the interest of the parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to a suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without him."

4. Chatterton & Son Is Not An Indispensable Party.

The amended complaint alleges in Paragraph II that Chatterton & Son had never qualified to do business in Montana (Tr. 55). Likewise as to Chatterton & Son, Inc. (Tr. 60). The allegations as to Chatterton & Son are admitted by the answer in paragraph II (Tr. 79). Thus Chatterton & Son was a foreign corporation with no agent designated in the state upon whom to serve process and no other officer or agent in the state at the time the action was brought upon whom process could be served. In fact, prior to the time the action was brought and prior, in fact, to the breach of the bond, Chatterton & Son had been dissolved as a corporation by order of the District Court of the State of Michigan (Plf. Ex. 5, Tr. 180-182).

As to Chatterton & Son, Inc., at the time the complaint was filed it had no remaining property or assets, having previously turned over all its assets to the Commissioner of Agriculture to settle for its liability as far as possible. Other assets had previously been turned over by it to a new company organized for the purpose. Thereafter Chatterton & Son Inc. had no remaining property and went out of business (Tr. 195, 196, 197-198).

We have thus a situation where it was impossible to find or serve any person as the principal of said bond and where, in

any event, no satisfaction could be obtained by any judgment. It is, in truth, doubtful to say the least whether Chatterton & Son, Inc. could be considered as the principal in the bond. Appellant has not so contended. And as to Chatterton & Son, it was out of existence, expired. If appellant's argument were to prevail, the court would have been ousted of jurisdiction and appellees would be completely barred of recovery.

The matter is covered by *Section 50* of the Judicial Code (Title 28 U. S. C. A. 111) and Equity Rule 39. *Section 50* reads as follows:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Equity Rule 39 reads as follows:

> "In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and

in such cases the decree shall be without prejudice to the rights of the absent parties."

In addition to the case of *Commercial Casualty Ins. Co. v. Lawhead,* referred to above, there are abundant cases cited under these provisions in U. S. C. A., to which reference is made.

In any event, the plea that Chatterton & Son is a necessary party for reformation will not stand analysis, and so likewise as to Chatterton & Son, Inc. The only excuse for such a plea is the claim that the surety could not be subrogated where the bond is reformed without the presence of the principal. This overlooks the fact that the ordinary rules of suretyship do not here apply and this instrument is more in the nature of an insurance policy. Furthermore the liability of Chatterton & Son itself to appellees is in no way dependent upon reformation of the bond. Chatterton & Son's liability arises from its defalcation, not upon its signature to the bond. The signature was a pure formality. The case of State v. Kronstadt, cited by appellant on page 42 of its brief, does therefore not apply. In that case the action was upon a bail bond with private sureties, not a compensated surety company. In this case, without any doubt, if Chatterton & Son were still a going concern, appellant, by this judgment, could be subrogated to the rights of appellees and recover against Chatterton & Son upon its defalcation as a warehouseman.

5. The Action is Properly Brought in the Name of the State of Montana Under the Terms of the Bond.

It is contended that there is no authority by statute to take the bond in the name of the State of Montana nor for the State

of Montana to sue. We submit that no statutory authority is needed to render the bond valid as running to the state and to permit the suit to be brought in the name of the state for the benefit of those who suffered the loss. The bonding company having undertaken the obligation, having been duly compensated therefore, and in its duly executed contract having named the obligee, we challenge its right to question its solemn engagement. It is, by its act, estopped to question or inquire into the right of the obligee to enforce the obligation. By the execution of the contract, appellant, as the obligor, has vested the legal right to the cause of action in the obligee named, and it is of no concern to the obligor who might be benefited or where the benefits or proceeds of the action might ultimately go.

Reference is first made to the Montana statute, Section 9067, which reads as follows:

> "Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

The Montana Supreme Court has strictly interpreted the statute to require that the action be brought in the name of the party who is the legal owner and holder of the cause of action. Thus in the case of *County of Wheatland v. Van*, 64 Mont. 113, 207 Pac. 1003, the action was upon a bail bond running to the State of Montana, but the action was brought by the County

of Wheatland for the reason that under the law the amount recoverable was repayable to the county. However the court held that the action could not be maintained in the name of the county, notwithstanding that the benefits were to run to the county. The court said:

> "It is an action on contract. The bond on its face disclosed the party entitled to maintain an action thereon in the event of breach. Although the money recovered goes to the county, yet the contract is with the state, not the county. What disposition is made by the state of the amount recovered is a matter of no concern as regards an action to recover on the bond. The state is expressly made the trustee of the money recovered on such obligations, and the law prescribes its disposition. It is merely a matter of state administration. There is no privity of contract between the county and the sureties on the bond, and therefore the judgment in favor of the county cannot stand."

See also *Genzberger v. Adams,* 62 Mont. 430, 205 Pac. 658, and *Martin v. American Surety Co.,* 74 Mont. 43, 238 Pac. 877.

In referring to the fact that the codes have relaxed the strict rules of the common law so as to enable the party directly interested, under many circumstances, to prosecute the action directly, the text in 20 R. C. L. 665 continues as follows:

> "This is not to be understood, however, as excluding one holding the legal title or right from suing in his own name. Such person may sue as the real party in interest, if he can legally discharge the debtor and the satisfaction of the judgment rendered will discharge the defendant, although the amount recovered is for the benefit of another; and if the real party in interest is the plaintiff, an objection that the contract sued on was

made by him as agent for others will not be considered. When a suit was properly commenced in a state court in the name of the real party in interest, under such a statute, and has been removed to a federal court, it may proceed in the name of the party who was the plaintiff in the state court, and when an action has been begun in a federal court, that court will follow, as a rule of practice, the decision of the supreme court of the state as to what constitutes a real party in interest under the state statues."

See also 20 R. C. L. 667 and 1 Bancrof's Code Pldg. 236-241.

Where the board of education which was erecting a building, took a bond running to itself, notwithstanding that the statute required that the bond should run to the state, in an action brought by the board in its own name, the court said:

"The statute requires the exaction of a bond for the protection of the sub-contractors, laborers and material-men, and it can make no difference in the application of the rule that the entire public are not the beneficiaries. The obligor has consented to make the board of education instead of the State the trustee for the interested parties."

Board of Education of Detroit v. Grant, (Mich.) 64 N. W. 1050.

Where a bond was given conditioned that the principal, charged with bastardy, would marry the prosecutrix and support her for a period of years, the bond providing that the amount thereof, in case of default, should be paid to the county judge to be by him distributed in accordance with his discretion; in an action upon the bond by the prosecutrix, it was held that no cause of action was stated in that the prosecutrix was not named as obligee in the bond, the county judge being the trustee of an

express trust and the holder of the legal title to the trust fund and as such being the only one who could sue to recover the trust fund except where he neglected or refused to perform his duty, in which case he should be made a party defendant and that fact set up in the complaint by the cestui que trust.

Meyer v. Meyer, (Wis.) 102 N. W. 52.

In a suit to recover damages for the failure of a city council to exact a bond as required by statute, for the protection of laborers and materialmen, it appeared that the city council did take a bond, but running to the municipality, while the statute required the bond to run to the people of the state. It was held that no cause of action was made out for, notwithstanding the statutory bond was not taken, yet the bond actually given was a common law bond which could be enforced by the municipality in an action in its name for the use of the materialman; that no cause of action lay in the name of the materialman himself; that no one could sue as plaintiff who did not have a legal interest, unless permitted to do so by statute. In this case it was held that the city was a trustee and could do nothing which would legally discharge the bond or effect the interest of the beneficiary. The court further said:

> "The city had the power to contract for the public work undertaken by Larson and the power to take from him a bond conditioned for the payment of labor and material. The duties of a mere promisee in such a bond are purely nominal and only for the purpose of furnishing someone who might be a plaintiff."

Stephenson v. Monmouth M. & M. Co., (Circuit Court) 84 Fed. 114, 117.

In a bond made payable to the commissioners of a drainage

district, where it was claimed that the action on the bond should have been instituted in the name of the board of supervisors of the county, it was held that the commissioners of the drainage district were the proper parties paintiff, the court saying:

> "The general rule is that the obligee of a bond is the proper party to enforce it - - - Certainly the plaintiff in error (surety company) after receiving a premium, as a consideration for executing a bond and in which the defendant in error was named as obligee is estopped to deny the capacity of the obligee to sue for a breach of the bond."
>
> *Equit. Surety Co. v. Board of Commissioners,* 256 Fed. 773, 775.

We quote other expressions of courts:

> "Where as in this case, the defendants have entered into a contract with the people of the state to do and perform certain things though the beneficiaries for whose benefit the promise is made are then undisclosed, and though they may be entirely without remedy when they spring into existence which they can enforce as to the promisee, there is on the part of the state a legal obligation which it may or may not admit."
>
> *People for the use of Colorado Fuel & Iron Co. v. Dodge,* (Colo.) 52 Pac. 637.

> "With certain exceptions every action must be prosecuted in the name of the real party in interest. Code Civil Proc. 367. But here the undertaking was in legal effect given to the party plaintiff in the ejectment, to whom, as the court below finds, was delivered the possession of the demanded premises. If the grantees of the plaintiff, of a date prior to the judgment, acquired any interest in the value of the use and occupation of

the defendant in the ejectment, it was one to be enforced against or in the name of their grantor. As to the undertaking, it is to pay plaintiff the value of the use and occupation. In legal effect the contract is made with him, and if others have claims on him with respect to it, he should be held as to them to be trustees of an express trust, authorized to sue on the undertaking."

Walsh v. Soule, (Cal.) 6 Pac. 82, 84.

The principle involved seems plain. It does not lie in the mouth of appellant to raise any question as to the right or capacity of the state to sue, since by executing the bond to the state it has confirmed that right insofar as the appellant is concerned. The principle is stated in 47 C. J. 26, as follows:

"The legal owner may bring his action for the use of whatever person he may choose. The legal owner's selection of a use-plaintiff is a matter with which defendant is not in any way concerned. So far as defendant is concerned, it is not necessary that the use-plaintiff should in fact have any interest or connection otherwise with the subject matter of the action. However, such an action must not prejudice any defenses which defendant may have had.

"The beneficial owner has the right to bring an action to his use in the name of the legal owner or, after his death, in the name of his administrator, without consent or authority, and even against the expressed wish of the legal plaintiff. The legal owner has not the right to refuse the use of his name as plaintiff by the beneficial owner; he cannot prevent the use of his name; and courts of law will protect the equitable right and will compel the nominal plaintiff to permit his name to be used for the recovery of the claim. Where the legal owner has a cause of action against defendant, it is

immaterial, so far as defendant is concerned, whether the use-plaintiff has any interest or not, that being a matter which concerns the legal and use-plaintiffs, and not defendant."

Quoting again from 47 C. J. 27:

"It has been held that there are three classes of cases in which there may be a use-plaintiff: (1) Where a contract is made between the legal plaintiff and defendant, largely for the benefit of other parties who may or may not be known at the time it is made, the legal plaintiff being interested only because it will aid in securing a proper performance. (2) - - - "

Quite aside from the matter of estoppel, there appears to be no good reason why in any event the state could not prosecute this suit, as is here done.

"Although a state is not pecuniarily interested, it may be the proper party to sue under the terms of a statute declaring that any "person" expressly authorized by statute may sue in his own name without joining the beneficiary; and where a bond has been executed to a state, for the benefit of another, an action upon the same may properly be brought by the state upon the relation and for the use of the person beneficially interested."

59 C. J. 324.

"Although the right to sue is sometimes expressly conferred by statute, it is well settled that, independently of any statutory provision therefor, a state may sue in its own courts either as sovereign, or by virtue of its rights as a political corporation."

69 C. J. 299.

"A state may become a party litigant only through the instrumentality of an agent or person designated by stat-

> ute, or empowered by recognized principles of law, to act for it in the matter at hand. Authority to institute or defend actions on behalf of a state usually resides in the attorney general or other executive law officer of the state; and the fact that a suit, brought in the name of the state, is brought or conducted by the attorney-general, or other law officer, is ordinarily sufficient to show that the suit is authorized by the state, even though the attorney-general is prohibited from bringing the particular suit unless advised to do so by certain other officers."
>
> 69 C. J. 322.

There are here about 135 bean growers involved. Assuming that, notwithstanding the Montana decisions indicated above, they could sue in their own names, each would then have an independent cause of action, requiring 135 separate suits, for while they could all assign their causes of action to one person, they might not be willing to trust such person and certainly are not required to do so in order to enforce their rights. Furthermore, in view of the fact that the amount of this bond is insufficient to satisfy all of the claims, the individuals could not sue without interfering with each other's rights or exceeding the penalty of the bond.

This action was commenced by the Attorney General of the State of Montana. The complaint was signed by him as such and sworn to by him on behalf of the state (Tr. 11-12). It has since been prosecuted by the Attorney General of the state through three administrations. The Attorney General participated in the trial. He now presents this brief on behalf of the state, as plaintiff. There can be no doubt of his authority, and

no doubt that the action is being properly and legally prosecuted by the state as the obligee in said bond to enforce the penalty and obligation thereof.

6. The Evidence Establishes Breach of the Conditions of the Bond and Loss and Damages Exceeding the Penalty Thereof.

The trial court, in its decision, made and stated its findings of fact and, among other things, found that the beans stored in the Chatterton warehouse were, from the beginning, treated by Chatterton & Son as their own, and that when the beans were shipped from the Billings warehouse, they were shipped with the intention of converting them, and that they were shipped without the consent of the owners and without their knowledge (Tr. 116). The court also found that all but 12,000 sacks of the beans (which would be 27,897 sacks) were shipped from the Billings warehouse between September 1930 and June 1931 (Tr. 115).

Thus the court has found that all of the beans were converted to their own use by Chatterton & Son during the life of the bond.

Appellant contends that the record does not show when the beans were converted and quotes certain evidence from the testimony of the witness Healow and the witness Chatterton from which it is argued that the shipments from Billings were innocent and honest and that there was no actual conversion until the subsequent sale of the beans.

The question, however, is not whether there might be testi-

mony in the record tending to prove that there was no conversion, but the sole question upon this review is whether there is any testimony sufficient to support the court's findings. In that connection, let it be remembered also that Mr. Chatterton was the president of Chatterton & Son and Mr. Healow the manager of its Billings warehouse. Chatterton & Son was the defaulting principal in the bond, to all intents and purposes the adverse party to the plaintiffs in this action. It is the wrongful acts of Chatterton & Son that are involved in this suit and which are under scrutiny. What Chatterton & Son did with these beans, while in their possession, would be a matter peculiarly within the knowledge only of Chatterton & Son and its officers and agents. Thus the proof of the defalcation of Chatterton & Son had to come through the mouths of these same officers and agents, and the wrongful conduct of Chatterton & Son would have to be the confessed wrongful conduct of these officers and agents. It is hardly to be expected that they would brazenly confess their own wrong and, on the contrary, it is to be expected that they would try to alibi themselves and put an honest interpretation upon their acts. The testimony of these witnesses must therefore be considered in the light of the interest of the witnesses and the court may rightfully construe that testimony most favorably to the plaintiffs.

However that may be, we submit that there is abundant testimony in the record to support the court's findings. A reading of the testimony as a whole can leave no doubt that, from the beginning, from the time these beans were taken in for storage, they were not treated by Chatterton & Son as stored beans, and the ownership and title of the depositors was not honored.

On the contrary, from the beginning, Chatterton & Son treated these beans as though they were their own and as though they had bought them or had an interest in them. Between the offices at Lansing, Michigan and Kansas City, Missouri, and the office at the Billings warehouse, there seems to be a confusion of the facts. Mr. Chatterton, the president, seemed to labor under the impression that they had bought these beans or had some interest therein, probably because advances had been made against many of them. He was under the impression that only such beans were shipped out of the Billings warehouse as Chatterton & Son owned, and that the beans taken for storage were kept and preserved at the Billings warehouse. Mr. Healow, on the other hand, knew otherwise and knew that stored beans were being shipped, but he was only acting under orders from Kansas City and his alibi was that he thought they were merely being shipped to Kansas City for storage there.

Without attempting to point out all of the testimony bearing upon this matter, we call attention particularly to the following:

Mr. Chatterton testified that his company would make a request on Mr. Healow for *certain carloads* of beans covering *certain grades, and if he (Healow) had them he would ship them* (Tr. 202).

Mr. Healow testified that from time to time certain lots of beans were ordered shipped to Kansas City by the Kansas City branch manager, and in response to those orders he shipped them from time to time. He said that these beans shipped by him were the beans belonging to the various owners who had them stored at the Billings warehouse (Tr. 137).

Mr. Healow made confusing and contradictory statements

with respect to whether consent of the growers or any of them was obtained for such shipments. First he said *usually* consent was obtained (Tr. 137). Then he said there was no objection raised by the growers in some cases, to the shipments (Tr. 138). Finally he said *that it was not the usual procedure to first go to the individual grower whose beans were being shipped out and obtain his consent* (Tr. 138).

Healow positively testified that none of the owners of the beans ever authorized the company or consented to the sale or other disposition of the beans after they were shipped (Tr. 140-141). He also said that the company was not able to deliver in Billings the beans represented by the warehouse receipts after they had gone out (Tr. 140).

The warehouse receipt issued to each and all of these growers called for storage of these beans at Billings and contracted that the beans would be stored at Billings. The form of the warehouse receipt is in evidence as plaintiff's exhibit 4 (Tr. 129). Mr. Healow testified as to the manner in which the blanks in this form were filled out (Tr. 156-157). The blank left for the place of storage would be filled in with the word "Billings" (Tr. 157). As this testimony has been reduced to narrative form, it is not, in this respect, as positive as the actual testimony of the witness. The actual question and answer, as they appear in the reporter's official transcript of the testimony at the trial, read as follows:

> "Q. And the "Storage at," that would read "Billings," or what would it say?
>
> A. Well, they would all read "Billings." They were all stored here."

Counsel for appellant will no doubt willingly agree to such an amendment of the record.

Reconstructing the warehouse receipt (Tr. 129), by filling in the blanks as testified to by Mr. Healow (Tr. 156-157), it will then read something as follows:

> "Received from John Doe 1000 Sacks of Beans for Storage at Billings. Storage and Insurance 2c per cwt. per month or fractional part thereof. In event beans are purchased by other than the undersigned a handling charge of 5c per cwt. shall be collected. All weights are subject to natural shrinkage. Delivery to holders of Receipts shall be as provided by the Laws of Montana. Beans insured for benefit of owner.
>
> CHATTERTON & SON
>
> By....."

Mr. Chatterton testified that when the warehouse was closed at Billings there were not sufficient beans in the warehouse to satisfy the outstanding warehouse receipts (Tr. 195).

Mr. Harris testified that when he went to Kansas City, after the close of the warehouse, to pursue settlement on behalf of the owners of the beans, in his conference with the attorney for Chatterton & Son the attorney admitted that the beans had been sold and could not be accounted for (Tr. 219). He further testified that representatives of Chatterton & Son told him that the beans had been sold on a falling market; that the beans represented by the warehouse receipts had been sold (Tr. 220).

With respect to the history of the shipment and sale of beans, it appears that all of them were shipped out of the Billings

warehouse and sold thereafter. This was established by the records of the company. The records were kept by Mr. Healow, showing the history and disposition of each lot of beans received for storage (Tr. 137). These records included the dates of shipment of the beans, and all of these records were turned over to Mr. Lindsay, the accountant for the bean growers (Tr. 138). Mr. Lindsay received these records and audited them and made a tabulated report thereon, giving complete information as to each lot of beans, including the date of shipment and the market value on the date of shipment (Tr. 226-228). This tabulated report is in evidence as plaintiff's exhibit 18 (Tr. 19).

It appears that all of these beans were shipped out prior to the closing of the warehouse, except 12,000 sacks (Tr. 139). These 12,000 sacks were shipped out about July 13, 1931, all being loaded at one time, as rapidly as possible, day and night (Tr. 139). When this was discovered by the bean growers, the investigation was precipitated, and the auditor of Chatterton & Son in charge of the shipments was arrested upon a larceny charge (Tr. 217-218).

Upon arrival of Mr. Harris at Kansas City, there were only 10,000 bags of beans to be found in Chatterton & Son's warehouse there (Tr. 119), and these had been hypothecated to the bank by Chatterton & Son (Tr. 219), and these 10,000 bags were in process of going (Tr. 220). It appears from the report of the accountant, plaintiff's exhibit 18, that the largest part of the beans was shipped during the year 1930; that over 25,000 sacks were shipped out before the middle of February 1931, about 2000 sacks from that time until June 1931, leaving about

12,000 sacks in the warehouse on the 1st of July, 1931, which were the 12,000 sacks shipped on July 13, 1931.

It also appears from exhibit 18, and from the testimony of the witness Healow, that the market value of beans at the time of the earlier shipments in the fall of 1930 was as high as $4.50 per bag (100 lbs.) and that it steadilly declined, shipments about January 1st, 1931 appearing to be at a value of $3.50 per bag, but showing a value of $2.25 per bag at the time of the closing of the warehouse. It is, however, quite apparent, that because of these higher values at the time of earlier shipments, the heaviest part of the loss by far was suffered before January 1st, 1931.

The accountant, Lindsay, made certain computations taken from the report and found that, considering the conversion as having taken place on the dates of shipment and thus fixing the value on those dates, the net value of the beans converted, after crediting all advances and charges, was over $65,000.00 (Tr. 229). It is safe to say (and can be proved from the report) that about $50,000.00 of this loss was for the beans shipped out before July 1st, 1931, and during the life of the bond.

Thus, even though the last 12,000 sacks are excluded, a loss is proved of at least $50,000.00. The total net amount collected and salvaged by Mr. Harris for the bean growers, from these remaining 12,000 sacks of beans, or the equity remaining therein, and from the liquidation of Chatterton & Son's remaining assets, was about $23,000.00 (Tr. 222). Properly this should be charged against these remaining 12,000 sacks to the extent of their value. In any event, however, the loss is several times greater than

the penalty of the bond, $10,000.00. In fact, computed at $2.25 per bag, as was done by the accountant (Tr. 223), the net loss still far exceeds $10,000.00, still excluding the 12,000 bags.

The conversion here clearly took place in each instance at the date of shipment, at least. Certainly there can be no doubt that the court's conclusion was right and that these shipments were not innocent and honest. These beans were acceped for storage at Billings. They were returnable at Billings under the terms of the warehouse receipt and under the law. It cannot be supposed that they were shipped to Kansas City, a thousand miles away, with the intention of shipping them back when the owner of the beans called for them. The guilt of Chatterton & Son is beyond question. It was never denied by any of its officers or agents. Its attorney confessed it. Healow knew, when he made the shipments, that the consent of the owners was required (Tr. 137). Mr. Chatterton knew it and, in effect, admitted that the beans were not shipped for further storage, but were shipped for sale. He said that they sold only their own beans, and that it was not intended to ship any beans from the Billings warehouse that were taken for storage (Tr. 202). That is tantamount to saying that the beans that were shipped were shipped as the beans of Chatterton & Son and sold as such.

The rules governing conversion are too well known to require citation of authority. Here, in these shipments, was certainly an exercise of dominion by Chatterton & Son over the beans, acts and conduct hostile to and in denial of the title and right of possession of the owners of the beans, and in derogation of their rights.

"The basis of liability for conversion by a bailee is that

> he has done some act implying the exercise or assumption of title, or of dominion over the goods, or some act inconsistent with the bailor's right of ownership, or in repudiation of such right."
>
> 4 Cal. Jur. 35.

The removal or asportation of a chattel with an intent to deprive the owner of his property or possession is a sufficient assertion of ownership to constitute a conversion; and the removal of another's property out of the state, without the consent of the owner, is an unwarranted assumption of control of the property constituting a conversion.

65 C. J. 39.

See also 65 C. J. 29 and 37 as to what constitutes conversion under these circumstances.

It is, in fact, a conversion for a bailee to deviate from the contract of bailment by the removal of the property from the place where it was to be stored by the terms of the bailment. Thus it is the general rule of law that where the bailee, without authority, deviates from the contract as to the place of storage, and a loss occurs which would not have occurred had the property been stored or kept in the place agreed upon, the bailee is liable for the loss, even though he is not negligent. The general proposition is stated in 2 Cooley on Torts, 3rd Ed. pp. 1332, 1333, as follows:

> "Every bailee is bound, in his use of the property, to keep within the terms of the bailment. If he hires a horse to go to one place, but goes with it to another, he is guilty of a conversion of the horse from the moment the departure from the journey agreed upon takes place. It is immaterial that the change is not injurious to the

interests of the bailor; it is enough that it is not within the contract."

There are innumerable cases supporting this rule.

Scott-Mayer Commission Co. v. Merchants' Grocer Co. (Ark.) 226 S. W. 1060.

Thornton v. Daniel (Tex.) 185 S. W. 585.

McCurdy v. Wallblom F. and C. Co., (Minn.) 102 N. W. 873.

For additional cases see annotation in 12 A. L. R. 1322.

The basis for this holding is that, by such deviation from the terms of the contract of bailment, the bailee converts the property. Here, by the terms of the bailment as shown in the warehouse receipt and the surrounding circumstances, these beans were to be stored at Billings in this particular warehouse. They were not only removed from the warehouse but they were removed from Billings, and in fact out of the state. Quite aside, then, from the undoubted fact that the beans were removed from the warehouse and shipped to Kansas City with the intent to sell them, the fact alone of the removal and shipment to Kansas City, without more, constituted a conversion.

A demand and refusal, while here admitted (Tr. 219). need not be shown in this case because of the admitted impossibility of compliance with a demand. In any event, however, where there has been an actual conversion, the demand relates back to the date of the conversion, to fix the date of liability.

State v. Broadwater Elevator Co., (Mont.) 201 Pac. 687, 693.

The breach of the conditions of the bond and the ensuing

loss and damages (far exceeding the penalty thereof) during the life of the bond, are here abundantly established, and the findings of the court in that respect amply supported it. As pointed out in the Statement of the Case, the amount of the judgment ($13,100.00) is the amount of the penalty of the bond with interest added from July 15, 1931, to the date of the judgment.

CONCLUSION

It is respectfully submitted that no error has occurred throughout these proceedings; that the court acted within its proper discretion in granting leave to amend the complaint; that the bond is properly enforcible in accordance with its plain terms, and its penalty cannot be avoided upon the excuse that the bond was not filed and a license not issued; that these matters affirmatively pleaded in the answer constitute no defense to this action and were properly stricken; and that all of the parties concerned clearly intended the bond to cover and protect against the loss of beans.

Respectfully submitted,

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